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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION (3)

STEVEN M. NELSON,

Plaintiff,

No. 3:19-cv-01761-HZ

V.

OBJECTION TO DEFENDANT'S WITNESS PATRICK KENNEDY

UNITED STATES OF AMERICA,
by and through the NATIONAL
OCEANIC and ATMOSPHERIC
ADMINISTRATION

Defendant.

Plaintiff objects to any evidence from defendant's witness Patrick Kennedy, an economist. The court's trial management order required the parties to list all of lay witnesses and narratives of expert witnesses by November 8, 2021. The defendant did not list Patrick Kennedy or provide his narrative until November 22, 2021.

1 The defendant will claim Patrick Kennedy is a rebuttal witness, and the
2 deadline for his narrative was November 22, 2021. However, only the plaintiff
3 should have rebuttal witnesses. The plaintiff has the burden to prove defendant's
4 negligence in causing his injuries, and the losses due to them.
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6 The defendant denies plaintiff's claim that it was negligent, and if it was
7 negligent, it claims the plaintiff's losses are either not related to his injuries or they
8 are less than he is claiming. It may do this by its own evidence or by refuting the
9 plaintiff's evidence. If it offers new evidence to refute the plaintiff's claims, he
10 may rebut it. But rebuttal belongs solely to the plaintiff in the present case. For
11 example, if the defendant offered evidence that the plaintiff had injured his left
12 shoulder and arm in a skiing accident the week before the gangway broke, the
13 plaintiff could offer evidence on rebuttal that his brother was injured in the skiing
14 accident, not he.
15

16 The plaintiff may not withhold part of his case-in-chief, and offer it on
17 rebuttal to try to sandbag the defendant. Nor may the defendant delay its evidence
18 that is part of its defense and call it rebuttal evidence.
19

20 The defendant may have rejoinder or sur-rebuttal in response to plaintiff's
21 rebuttal. But rebuttal belongs solely to the plaintiff, unless the defendant had the
22 burden of proof on a counter-claim. McCormick, *Evidence*, §4, pp. 5-6 (2d ed.
23 1972). In the present case, there is no counter-claim and only the plaintiff has the
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1 burden of proof.

2 The defendant should have offered the report of Dr. Kennedy by November
3
4 8, 2021. He is not a rebuttal witness. The defendant knew or should have known
5 the plaintiff would offer economic evidence of his past and future loss of wages
6 and wage-earning capacity.
7

8 The defendant's failure to provide Dr. Kennedy's report by November 8,
9 2021 has delayed the preparation of Dr. Torelli's review and the plaintiff's
10 preparation of his case. Dr. Torelli is the plaintiff's economic expert. The
11 defendant has not even attempted to show good cause for its delay in providing Dr.
12 Kennedy's narrative or report, much less a strong showing of good cause. The
13 court must exclude Dr. Kennedy as a witness under its trial management order.
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17 Dated: November 24, 2021.
18

19 Respectfully submitted,
20

21 *s/ Charles Robinowitz*

22 CHARLES ROBINOWITZ, OSB #691497
23 Law Office of Charles Robinowitz
24 Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that, on November 24, 2021, a true and correct copy of the foregoing OBJECTION TO DEFENDANT’S WITNESS PATRICK KENNEDY was served electronically through CM/ECF on:

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